APPEAL NO. 93427

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on April 30, 1993, hearing officer), presiding. The issues at the hearing were whether the appellant (claimant herein) had reached maximum medical improvement (MMI), and if so, his correct percentage of whole body impairment. The hearing officer found that the claimant had reached MMI on August 18, 1992, with a seven percent whole body impairment, based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission).

The claimant appeals arguing that he has not reached MMI because he requires spinal surgery according to the opinions of three physicians other than the designated doctor. The claimant also argues that the opinion as to surgery of these three physicians constitutes the great weight of the medical evidence contrary to the view of designated doctor, particularly because the designated doctor is not qualified to perform spinal surgery and the three other physicians are so qualified.

The respondent (carrier herein) replies that only one of the doctors who examined the claimant recommended surgery, and this doctor found MMI on the same date as the designated doctor. The carrier contends that the opinion of the designated doctor should be given presumptive weight and the decision of the hearing officer should not be disturbed.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant had been working for (employer) for four to five months when on (date of injury), he was riding to a job site in the back of pickup truck. The driver of the truck had to slam on the brakes to avoid a collision, hurling the claimant into the bed of the truck and injuring his low back.

In light of the very different reading of the medical records by the parties, a very detailed discussion of medical history is required. The claimant initially was treated by (Dr. T) in Jasper, Texas, who diagnosed back strain, back contusion and hematuria. Dr. T's initial treatment plan consisted of rest and hot tub soaks. Dr. T referred the claimant to (Dr. R), a (city) neurosurgeon, who initially examined the claimant on (date of injury), and who ordered x-rays and an MRI of the lumbosacral spine. The radiology reports of these tests indicated evidence of a small central disc bulge at L4-5 suggestive of a shallow herniated nucleus pulposus and "[g]rade I spondylolisthesis with associated spondylolysis at L5 on S1." Dr. R stated in his report of July 17, 1991:

This patient has a Grade I spondylolisthesis of L5 on S1 and a very small protrusion of the disc at L4-5, either or both of which could have been aggravated by the

> accident in question. However, I do not think he is a candidate for any surgery at this time and feel he should be treated by conservative orthopedic means for the time being. The patient will be referred to an orthopedic surgeon for his evaluation and possible conservative treatment for the time being and if the orthopedic surgeon feels that something more needs to be done, I would be most happy to see the patient again to work with him on this.

Dr. R then referred the claimant to (Dr. D), a (city) orthopedic surgeon.

Dr. D initially saw the claimant on July 31, 1991, and suggested a treatment plan consisting of medications and a lumbosacral brace. Dr. D next saw the claimant on September 9, 1991, and states in his report of that date:

> He related to me that he has had no improvement at all being in his brace. Prognostically that is a bad sign that any kind of surgical intervention, especially something stabilizing such as a fusion would be of much benefit to this patient. I am going to refer him to my therapist where the patient can be taught back rehab exercises. The patient will be instructed to do these on his own on a daily basis.

Dr. D next saw the claimant on October 9, 1991, when Dr. D opines that the claimant should continue the course of treatment but states, "[i]t may be that he will be a candidate for surgery in the near future." On the claimant's January 27, 1992, visit, Dr. D noted no change in the claimant's condition and states:

> I feel the only recourse we have would be to set him up for a laminectomy, decompression and fusion. He is considering this. He will let us know if he decides to undergo the surgery. Otherwise, he will be checked in 2 months.

In April 1992, the claimant saw (Dr. C), an Orange physician, who claimant testified at the hearing was the carrier's independent medical examiner. Dr. C stated in his report that the claimant, ". . . has a symptomatic lumbosacral joint which has resisted adequate conservative treatment. I think that this patient would definitely benefit from a successful lumbar fusion." While the record is unclear as to whether the claimant was again examined by Dr. C, Dr. C does certify on a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on August 18, 1992, with a 25% whole body impairment. Dr. C indicates in the TWCC-69 that his impairment rating is for "the whole body without surgery."

The record does show a medical examination by Dr. D on June 15, 1992, and report of this examination in which Dr. D states:

> I discussed with him the pros & cons of surgery demonstrating what possibly needs to be done. . . . I have suggested that if he is considering surgery I should

> refer him back to [Dr. R] or one of his partners such as [Dr. S] for him to evaluated for the possibility of considering a decompressiion (sic) as well as a fusion.

The claimant testified at the hearing after Dr. D recommended surgery the claimant requested to be referred to another doctor for a second opinion. The claimant testified that Dr. D told him that he didn't need to get a second opinion, but needed to go back to Dr. R to start preparations for surgery. The claimant testified that he did not want Dr. D to operate on him as a nurse in his home town who is a friend of his mother told his mother that she "hadn't heard good things" about Dr. D and not to "let him do surgery." The claimant testified that his sister's husband, who is a doctor, recommended he see s (Dr. K), an orthopedic surgeon, and that he did so.

In his report of September 11, 1992, Dr. K notes that the claimant, "has had no physical therapy," and states:

> Surgical vs. non surgical treatment are both viable options. If surgery is desired by the patient, he should understand the risks and benefits of surgery which would be in the form of a laminectomy and fusion as mentioned in his treating physician's note. I have no problem with either mode of treatment.

Dr. K initially returned the claimant to the treatment of Dr. D, but in an addendum to his report dated September 21, 1992, states, "patient wishes to change physicians & adjuster ok'd--Rx for 8 wks. P.T. and follow-up exam following." Dr. K in his notes states that the claimant and the adjuster were advised of the addendum and that the prescription for physical therapy was mailed to the claimant. Dr. K's records also indicate that physical therapy "should be started ASAP" and the claimant needed to call Dr. K's office in eight weeks to schedule follow-up. A December 10, 1992, note in Dr. K's records states: "Do not want to take over this pts care--he seems to be fairly <u>non</u>-compliant according to adj's notes & phn call today--she can't even find pt. to see if he ever took P.T. we gave him back in Sept!" There is also an undated note in Dr. K's records which states, ". . . will see him again <u>if</u> he chgs his attitude--I told him adj. would have to ok more visits & should call us."

On a TWCC-69 dated February 1, 1993, Dr. H), a (city) general practitioner and the Commission selected designated doctor, certified that the claimant had reached MMI on August 18, 1992, with a seven percent whole body impairment rating.

The claimant testified that he lives in a rural area 55 miles outside of , Texas, in which there are few doctors. He also testified that he was not non-compliant with Dr. K's treatment, but he simply could not afford to travel to city three or four times a week to attend physical therapy. He testified that he was unaware that he might be entitled to a mileage reimbursement for trips to a physical therapists since the carrier had never told him, he was

unrepresented at the time, and he was not familiar with the workers' compensation law. The claimant further testified other than Dr. K he had not found a surgeon that he would want to "cut in my back," and while he feared surgery, if the misunderstanding with Dr. K could be straightened out and arrangements could made for travel, he wants Dr. K to operate on his back.

The claimant testified concerning his difficult financial situation and concerning his physical problems. He testified that he believes he has not reached MMI because he needs surgery to improve his physical condition.

Article 8308-4.25(b) (1989 Act) provides:

> If a dispute exists as to whether the employee has reached maximum medical improvement, the commission shall direct the employee to be examined by a designated doctor selected by mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor selected by the commission. The designated doctor shall report to the commission. The report of the designated doctor shall have presumptive weight, and the commission shall base its determination as to whether the employee has reached maximum medical improvement on that report unless the great weight of the other medical evidence is to the contrary.

Article 8308-4.26(g) states:

> If the impairment rating is disputed, the commission shall direct the employee to be examined by a designated doctor selected by the mutual agreement of the parties. If the parties are unable to agree on a designated doctor, the commission shall direct the employee to be examined by a designated doctor selected by the commission. The designated doctor shall report to the commission in writing. If the parties agree on a designated doctor, the commission shall adopt the impairment rating made by the designated doctor. If the commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors.

Claimant argues that the great weight of the other medical evidence in the present case is against the finding of MMI by the commission selected designated doctor. Claimant contends that he has not reached MMI if he would benefit from surgery since MMI is defined in Article 8308-1.03(32)(A) as "the point after which further material recovery or lasting

improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability." The claimant asserts that if the evidence shows that surgery would improve his condition by definition he could not be at MMI.

We have previously addressed this issue. We have held that where the claimant was a candidate for surgery and testified that he intended to have surgery pending another doctor's recommendation; the designated doctor did not offer any opinion as to whether such surgery would result in further material recovery from or lasting improvement to the claimant's injury; and there was an absence of any medical evidence that the claimant did not need surgery, a remand was necessary for the development of further evidence with regard to the designated doctor's opinion regarding surgery. Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993. By contrast, we have affirmed a hearing officer's determination of MMI and impairment based upon the report of the designated doctor, where such doctor specifically found surgery would not be effective, despite recommendations from other doctors. Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993. *See also* Texas Workers' Compensation Commission Appeal No. 93311, decided June 7, 1993, where we upheld the hearing officer's adoption of the designated doctor's report which found MMI but which addressed the possibility of a second surgery, finding that such surgery would be "unlikely to return [the claimant] to an active laboring lifestyle."

In the present case the designated doctor does not explicitly address either the need or the effect of the surgery in his TWCC-69. He does refer to the preceding doctors seen by the claimant and that the MRI had revealed a herniated nucleus pulposus. From this it could be inferred that the designated doctor considered the medical opinions concerning the possible benefits of surgery. Further, the MMI date certified by the designated doctor is the same date certified by Dr. C, the carrier's medical examination doctor and the only doctor who clearly states that the claimant would benefit from surgery. While Dr. D stated that "the only recourse" is surgery after the failure of conservative treatment, he also stated that the claimant's failure to improve with the back brace was a bad sign that any surgery would prove beneficial to the claimant. Dr. K indicated that surgery was an option but his report stated that either therapy or surgery was an option in treating the claimant, and the claimant testified that Dr. K preferred to attempt therapy. There was in fact testimony from the claimant that he had been told by the doctors that even with surgery he would be unable to return to construction work.

This is not to say that these reports cannot be read another way or that there is not conflict and ambiguity in the medical evidence concerning whether surgery would benefit the claimant. There, in fact, was conflict and inconsistency, and it is the province of the hearing officer to resolve such conflicts and inconsistencies. Article 8308-6.34(e) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given the

evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We have held, however, that because one doctor is a specialist and another is a general practioner does not necessarily entitle the opinion of the specialist greater weight. *See* Texas Workers' Compensation Commission Appeal No. 93412, decided July 8, 1993; Texas Workers Compensation Commission Appeal No. 93062, decided March 1, 1993.

Another issue which is of concern in the present case is the delay in obtaining surgery. In affirming the hearing officer's reliance upon the designated doctor's finding of MMI, we noted in Appeal No. 93290, *supra*, that there was nothing in that record to indicate that surgery had been scheduled. We also cited the fact that surgery had been scheduled at the time of the contested case hearing as a factor in our decision in a case reversing the hearing officer's reliance upon the designated doctor's finding of MMI. Texas Workers' Compensation Commission Appeal No. 93336, decided June 16, 1993. In the present case, the medical evidence is that surgery was discussed with claimant and he was considering surgery as early as January, 1992, yet by the time of the hearing in April 1993, no surgery had been scheduled.

As we stated in our decision in Appeal No. 93293, *supra*:

> We do not take the position that simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found. Each case must be decided on its own merits and factors such as when the claimant first learned of the need for surgery, the claimant's actions after obtaining that information, the reason for delay, if any, in scheduling surgery, and the opinions of doctors may be evaluated in such cases.

Applying this standard as well as the proper standards of appellate review discussed above, we cannot say that the decision of the hearing officer was not supported by sufficient evidence.

The decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge